



**Why Maine Should Reject ABA Model Rule 8.4(g)**  
**Maine Supreme Judicial Court Comment Period Ends 4:00 PM, June 5, 2018**

ABA Model Rule 8.4(g) is a deeply flawed rule adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. Fortunately, it can only operate in those states in which the highest court adopts it; and to date, only the Vermont Supreme Court has done so.<sup>1</sup>

The Maine Supreme Judicial Court seeks comment on whether to adopt ABA Model Rule 8.4(g).<sup>2</sup> The Court also seeks comment on a new CLE requirement that every Maine attorney annually complete an *additional live* credit hour regarding the “harassment and discriminatory conduct or communication” covered by Rule 8.4(g).<sup>3</sup>

After scrutinizing ABA Model Rule 8.4(g), official bodies in numerous states have concluded that it is too flawed to impose on bar members. Federalism’s great advantage is that one state can reap the benefit of other states’ trial and error. Prudence counsels a course of waiting to see whether other states adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states.

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, explains in a **two-minute Federalist Society video** at <https://www.youtube.com/watch?v=AfpdWmlOXbA>. His Federalist Society debate that demonstrates the rule’s flaws is at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>. The late Professor Ronald Rotunda, a highly respected constitutional law scholar and ethics expert, described the rule’s threat to lawyers’ speech in “*The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*,” The Heritage Foundation, Oct. 6, 2016.<sup>4</sup> His Federalist Society debate is at <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

Model Rule 8.4(g) would operate as a speech code because it applies to all “conduct related to the practice of law,” including “business or social activities in connection with the practice of law.” Furthermore, the proposed rule makes clear that it applies to “conduct or *communication* related to the practice of law,” which includes, of course, speech. The real question is what speech does ABA Model Rule 8.4(g) *not* reach? Activities within its scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer
- publishing law review articles, blogposts, and op-eds
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social issues
- serving on the boards of various religious or other charitable institutions
- serving at legal aid clinics
- serving political or social action organizations
- lobbying or testifying before legislative committees
- serving one’s congregation
- serving one’s alma mater if it is a religious institution of higher education
- serving religious ministries that assist vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties or campaigns

---

<sup>1</sup> For further information, contact Kim Colby at [kcolby@clsnet.org](mailto:kcolby@clsnet.org) or find resources at <https://www.christianlegalsociety.org/aba-model-rule-maine> and <https://www.clsreligiousfreedom.org/resources/aba-model-rule-84g-and-states>.

<sup>2</sup> <https://www.clsnet.org/document.doc?id=1138>.

<sup>3</sup> <https://www.clsnet.org/document.doc?id=1139>.

<sup>4</sup> <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

Attempts to impose Model Rule 8.4(g) have been rejected or abandoned in several states, including:

- **Formal rejection:** *Tennessee* and *South Carolina* have rejected ABA Model Rule 8.4(g).<sup>5</sup>
- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada* (at the supreme court level) and *Louisiana* (at the professional rules committee level) after comment periods.<sup>6</sup>
- **Comment period without announced decision:** No state supreme court decision has yet been announced after a comment period was held on adoption of some version of ABA Model Rule 8.4(g) in *Illinois*, *Idaho*, *Montana*, *Pennsylvania*, and *Utah*.
- **State bar activity:**
  - The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”<sup>7</sup>
  - The *North Dakota* Joint Committee on Attorney Standards recommended rejection of ABA Model Rule 8.4(g).
  - The *Louisiana* Rules of Professional Conduct Committee, which had spent a year studying Model Rule 8.4(g), voted “not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court.”<sup>8</sup>
  - The Disciplinary Board of the Supreme Court of *Pennsylvania* explained that ABA Model Rule 8.4(g) was too broad:

It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.<sup>9</sup>
- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The impact of Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees” greatly concerned the Montana Legislature.<sup>10</sup> It was also concerned about its effect on state legislators’ speech when working on legislative matters, speaking to constituents, or campaigning.
- **State attorney generals:** The Attorney Generals of *Tennessee*, *Texas*, *Louisiana*, and *South Carolina* each issued an opinion finding that ABA Model Rule 8.4(g) has significant constitutional problems and should not be adopted.<sup>11</sup>

**Take action:** Additional reasons why Model Rule 8.4(g) should be rejected are explored in this recent comment letter of the Christian Legal Society<sup>12</sup> and this law review article.<sup>13</sup> Individuals may file comments, long or short, with the Maine Supreme Judicial Court by email at [lawcourt.clerk@courts.maine.gov](mailto:lawcourt.clerk@courts.maine.gov).<sup>14</sup> If an attachment is included, it must be in pdf format. Comments should include the name and mailing address of the commenter and will be a public document. **The written comment deadline is 4 p.m. on Tuesday, June 5.**

---

<sup>5</sup> [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf) ;  
<http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

<sup>6</sup> <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>;  
<https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>;  
<sup>7</sup> <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

<sup>8</sup> <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

<sup>9</sup> <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

<sup>10</sup> <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

<sup>11</sup> <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>;

<https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; <http://www.scag.gov/archives/31861>;  
<https://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384> .

<sup>12</sup> <https://www.clsnet.org/document.doc?id=1126>

<sup>13</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2946375](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946375)

<sup>14</sup> <https://www.clsnet.org/document.doc?id=1140>